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| APPLICATION NO.  | FILING DATE | FIRST NAMED INVENTOR | ATTORNEY DOCKET NO. | CONFIRMATION NO. |
|--|-------------|----------------------|---------------------|------------------|
| 10/629,097   | 07/29/2003  | James B. Keller      | 5580-01102          | 6363             |
| 35690  | 7590        | 06/03/2004           | EXAMINER            |                  |
| MEYERTONS, HOOD, KIVLIN, KOWERT & GOETZEL, P.C.<br>P.O. BOX 398<br>AUSTIN, TX 78767-0398 |             |                      | VU, TRISHA U        |                  |
|  |             | ART UNIT             | PAPER NUMBER        | 2112             |

DATE MAILED: 06/03/2004

Please find below and/or attached an Office communication concerning this application or proceeding.

|                              |                 |               |
|------------------------------|-----------------|---------------|
| <b>Office Action Summary</b> | Application No. | Applicant(s)  |
|                              | 10/629,097      | KELLER ET AL. |
|                              | Examiner        | Art Unit      |
|                              | Trisha U. Vu    | 2112          |

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

#### Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

#### Status

1) Responsive to communication(s) filed on 07/29/03.  
 2a) This action is FINAL.                    2b) This action is non-final.  
 3) Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

#### Disposition of Claims

4) Claim(s) 1-43 is/are pending in the application.  
 4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.  
 5) Claim(s) \_\_\_\_\_ is/are allowed.  
 6) Claim(s) 1-43 is/are rejected.  
 7) Claim(s) \_\_\_\_\_ is/are objected to.  
 8) Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

#### Application Papers

9) The specification is objected to by the Examiner.  
 10) The drawing(s) filed on \_\_\_\_\_ is/are: a) accepted or b) objected to by the Examiner.  
     Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
     Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).  
 11) The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

#### Priority under 35 U.S.C. § 119

12) Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).  
 a) All    b) Some \* c) None of:  
     1. Certified copies of the priority documents have been received.  
     2. Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.  
     3. Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

#### Attachment(s)

|   |   |
|---|---|
| 1) <input checked="" type="checkbox"/> Notice of References Cited (PTO-892)   | 4) <input type="checkbox"/> Interview Summary (PTO-413)<br>Paper No(s)/Mail Date. _____ |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948)  | 5) <input type="checkbox"/> Notice of Informal Patent Application (PTO-152)             |
| 3) <input checked="" type="checkbox"/> Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08)<br>Paper No(s)/Mail Date <u>20031229</u> . | 6) <input type="checkbox"/> Other: _____  |

## DETAILED ACTION

1. Claims 1-43 are presented for examination.

### ***Double Patenting***

A rejection based on double patenting of the "same invention" type finds its support in the language of 35 U.S.C. 101 which states that "whoever invents or discovers any new and useful process ... may obtain a patent therefor ..." (Emphasis added). Thus, the term "same invention," in this context, means an invention drawn to identical subject matter. See *Miller v. Eagle Mfg. Co.*, 151 U.S. 186 (1894); *In re Ockert*, 245 F.2d 467, 114 USPQ 330 (CCPA 1957); and *In re Vogel*, 422 F.2d 438, 164 USPQ 619 (CCPA 1970).

A statutory type (35 U.S.C. 101) double patenting rejection can be overcome by canceling or amending the conflicting claims so they are no longer coextensive in scope. The filing of a terminal disclaimer cannot overcome a double patenting rejection based upon 35 U.S.C. 101.

2. Claims 4-6, 19, 26-28, and 43 are rejected under 35 U.S.C. 101 as claiming the same invention as that of claims 20-22, 24, 44-46, and 43 respectively of prior U.S. Patent No. 6,633,936. This is a double patenting rejection.

The nonstatutory double patenting rejection is based on a judicially created doctrine grounded in public policy (a policy reflected in the statute) so as to prevent the unjustified or improper timewise extension of the "right to exclude" granted by a patent and to prevent possible harassment by multiple assignees. See *In re Goodman*, 11 F.3d 1046, 29 USPQ2d 2010 (Fed. Cir. 1993); *In re Longi*, 759 F.2d 887, 225 USPQ 645 (Fed. Cir. 1985); *In re Van Ornum*, 686 F.2d 937, 214 USPQ 761 (CCPA 1982); *In re Vogel*, 422 F.2d 438, 164 USPQ 619 (CCPA 1970); and, *In re Thorington*, 418 F.2d 528, 163 USPQ 644 (CCPA 1969).

A timely filed terminal disclaimer in compliance with 37 CFR 1.321(c) may be used to overcome an actual or provisional rejection based on a nonstatutory double patenting ground provided the conflicting application or patent is shown to be commonly owned with this application. See 37 CFR 1.130(b).

Effective January 1, 1994, a registered attorney or agent of record may sign a terminal disclaimer. A terminal disclaimer signed by the assignee must fully comply with 37 CFR 3.73(b).

3. Claims 1-17, 23, 25-40, 47 of U.S. Patent No. 6,633,936 contain every element of claims 1-3, 7-18, 20-25, and 29-42 of the instant application and as such anticipate claims 1-3, 7-18, 20-25, and 29-42 of the instant application.

The claims correspond to one another as follows:

| Application | Patent |
|-------------|--------|
| 1           | 1      |
| 2           | 2      |
| 3           | 3      |
| 7           | 23     |
| 8           | 4      |
| 9           | 5      |
| 10          | 6      |
| 11          | 7      |
| 12          | 8      |
| 13          | 9      |
| 14          | 10     |
| 15          | 11     |
| 16          | 12     |
| 17          | 13     |
| 18          | 14     |
| 20          | 15     |
| 21          | 16     |
| 22          | 17     |
| 23          | 25     |
| 24          | 26     |
| 25          | 27     |
| 29          | 47     |
| 30          | 28     |
| 31          | 29     |
| 32          | 30     |
| 33          | 31     |
| 34          | 32     |
| 35          | 33     |
| 36          | 34     |
| 37          | 35     |

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|----|----|
| 38 | 36 |
| 39 | 37 |
| 40 | 38 |
| 41 | 39 |
| 42 | 40 |

***Conclusion***

The prior art made of record and not relied upon is considered pertinent to applicant's disclosure, as the art discloses retry latencies:

|           |           |                 |
|-----------|-----------|-----------------|
| US Patent | 6,021,483 | Adar et al.     |
| US Patent | 6,081,859 | Munguia         |
| US Patent | 6,282,598 | Manabe          |
| US Patent | 6,289,406 | Chambers et al. |

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Trisha U. Vu whose telephone number is 703-305-5959. The examiner can normally be reached on Mon-Thur and alternate Fri from 7:00am to 4:30pm.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Mark Rinehart can be reached on 703-305-4815. The fax phone number for the organization where this application or proceeding is assigned is 703-872-9306.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR

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system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

*Trisha Vu*  
Trisha U. Vu  
Examiner  
Art Unit 2112

uv

*Sumati Lefkowitz*  
**SUMATI LEFKOWITZ**  
**PRIMARY EXAMINER**